BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JARED CARPENTER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,027,679
RUSSELL STOVER CANDIES	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY	)	
OF AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent appeals the May 16, 2006 preliminary hearing Order of Administrative Law Judge Bryce D. Benedict. Claimant was awarded medical treatment with Joseph G. Sankoorikal, M.D., until certified as having reached maximum medical improvement (MMI). Respondent contends that claimant's need for medical treatment arises out of his new job with Wal-Mart.

ISSUES

Did the ALJ exceed his jurisdiction in ruling that claimant's need for medical treatment arose out of and in the course of his employment with respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the ALJ should be reversed.

Claimant worked for respondent as a service employee for several months. On November 30, 2005, while lifting a 50-pound tub of caramel, he injured his low back. Claimant reported the injury and was referred on December 2, 2005, to Occupational Health Partners, LLC, where he was examined by Ann McConkey, a nurse practitioner. At that time, claimant had complaints to his low back. Claimant advised nurse McConkey that he was using pain medicine from a previous back strain. At the preliminary hearing, claimant denied previous back problems. At the examination, claimant's pain was limited

to his low back, with no radiculopathy noted. Claimant was returned to work, light duty, and a follow-up appointment was scheduled 10 days into the future.

Claimant was next examined by nurse McConkey on December 13, 2005, at which time he reported he was better. He reported he has a little pain in the morning when he first gets up, but he has been able to work without difficulty. Claimant was returned to regular duty without restrictions. A follow-up appointment was scheduled for two weeks into the future. The office note of December 27, 2005, indicated that claimant did not show for the scheduled appointment.

The next notation in the file is dated February 2, 2006, and deals with burns to claimant's hands. There is no mention of claimant's back in this report. Claimant testified that when he returned to respondent's plant with restrictions for the burns, his employment was terminated.

Claimant filed for unemployment, but received none. He did obtain employment, approximately one month after the burn injury, with the Wal-Mart store in Junction City, Kansas, working on a remodeling project in the store. Claimant was required to repetitively stand, stoop and lift at the new job. Claimant was forced to quit his job with Wal-Mart on approximately April 21, 2006, due to the back problems associated with the Wal-Mart job.

Claimant testified that his back pain never fully resolved while working for respondent and after his termination. He also stated the leg radiculopathy began approximately one month after his termination from respondent, but before he acquired the job with Wal-Mart.

Claimant was referred by his attorney to board certified orthopedic surgeon Sergio Delgado, M.D., for an examination on April 6, 2006. Claimant presented himself to Dr. Delgado with low back pain and radiculopathy down to his knees, bilaterally. The knee radiculopathy was described as a sensation of weakness, giving out of both legs, when his back pain increased. In the history given to Dr. Delgado, claimant indicated an injury on December 2, 2005, with low back pain and radiation of pain into the lower extremities, which claimant reported was the result of his lifting activities. Claimant reported that the job with Wal-Mart aggravated his symptoms, but he related no new injuries. Claimant provided a pain drawing for Dr. Delgado, which displayed pain in his low back and his bilateral knees.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[1]

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[1] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[2]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[3]

It is not disputed that this claimant suffered an accidental injury arising out of and in the course of his employment with respondent. The dispute arises regarding whether claimant's current need for treatment arises from that injury or from his intervening employment with Wal-Mart.

When a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[4] It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.[5]

Here, claimant suffered an accidental injury while working with respondent. He was provided medical care and released to return to regular work. Claimant alleges his condition did not fully improve while with respondent. However, the medical records from Ms. McConkey contradict claimant's testimony. The last examination with Ms. McConkey indicates claimant's condition had gotten better. In fact, a follow-up appointment with Ms. McConkey was missed by claimant with no explanation. Additionally, the initial medical reports contemporaneous with the injury do not indicate the presence of

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[2] K.S.A. 2005 Supp. 44-501(a).

[3] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[4] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[5] *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

radiculopathy, while the reports from Dr. Delgado, after claimant worked for Wal-Mart, include the presence of radiculopathy.

The Board finds, under these circumstances, the current need for medical treatment arises from claimant's work with Wal-Mart and would, therefore, constitute a new accidental injury and is not compensable as a direct and natural consequence of the original injury. The Board, therefore, finds that the Order of the ALJ awarding medical benefits in this matter should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bryce D. Benedict dated May 16, 2006, should be, and is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of August, 2006.

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Brenden W. Webb, Attorney for Respondent and its Insurance Carrier